

No. PD-0792-17

IN THE
TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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**THE STATE OF TEXAS,
PETITIONER,**

v.

**AMANDA WATERS,
RESPONDENT.**

ON PDR FROM THE SECOND
COURT OF APPEALS

**AMICUS CURIAE BRIEF BY THE DISTRICT ATTORNEY FOR
THE 105TH JUDICIAL DISTRICT OF TEXAS**

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)
douglas.norman@nuecesco.com

Attorney for Amicus Curiae

STATEMENT OF COMPLIANCE WITH TEX. R. APP. P. 11

The present amicus curiae brief is filed by the District Attorney's Office for the 105th Judicial District of Texas, in accordance with the requirements of Texas Rule of Appellate Procedure 11. No fee has been paid or will be paid for the preparation of this brief. The certificate of service attached to the back page of this brief certifies that copies have been mailed to all parties.

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NO. PD-0792-17
(Appellate Court Cause No. 2-16-00274-CR)

THE STATE OF TEXAS,	§	IN THE
Petitioner,	§	
	§	
V.	§	COURT OF CRIMINAL APPEALS
	§	
AMANDA WATERS,	§	
Respondent.	§	OF TEXAS

AMICUS CURIEA’S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

PRELIMINARY STATEMENT

The District Attorney for the 105th Judicial District of Texas has a special interest in the resolution of this case because of a similar issue now pending before the Thirteenth Court of Appeals in *State of Texas v. Priscilla Medina*, No. 13-17-____-CR (Tex. App.—Corpus Christi) (notice of appeal filed December 15, 2017), in which the State has raised a similar challenge to the continued validity of *Tarver* and the application of collateral estoppel effect to a “not true” finding on motion to revoke community supervision.

ARGUMENT

The facts concerning a new offense are never “necessarily decided” against the State by a “not true” finding on motion to revoke, because the not true finding is itself unnecessary to the trial court’s decision to continue the defendant on community supervision instead of revoking him.

In its brief, the State makes the argument, among others, that, because there was more than one ground alleged for revoking community supervision, and other grounds had been found true, it was unnecessary for the trial court to make a “not true” finding concerning commission of the separate offense in question. (State’s Brief pp. 34-36)

Amicus would suggest that, regardless of the presence or absence of other alleged violations, a “not true” finding is never necessary to the trial court’s decision to continue the defendant on community supervision, and therefore it is never an appropriate vehicle to collaterally estop the State from later trying the defendant for the underlying criminal offense.

Collateral Estoppel is Limited to Necessary/Essential Findings.

Collateral estoppel only applies when facts in the first proceeding were “necessarily decided” and “essential to the judgment.” *See York v. State*, 342 S.W.3d 528, 539 & 545 (Tex. Crim. App. 2011) (citing Restatement (Second) of Judgments § 27); *see also Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796, 801 (Tex. 1994) (applying collateral

estoppel on the civil side only to facts that “were essential to the judgment in the first action”). Likewise, the Supreme Court has explained:

Issue preclusion bars successive litigation of “an issue of fact or law” that “is actually litigated and determined by a valid and final judgment, and ... is essential to the judgment.” Restatement (Second) of Judgments § 27 (1980) (hereinafter Restatement). If a judgment does not depend on a given determination, relitigation of that determination is not precluded. *Id.*, § 27, Comment *h.* ... A determination ranks as necessary or essential only when the final outcome hinges on it. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4421, p. 543 (2d ed.2002).

Bobby v. Bies, 556 U.S. 825, 834–35, 129 S. Ct. 2145 (2009). Comments in the Restatement of Judgments also shed light on what is meant by “essential to the judgment,” as follows:

Determinations not essential to the judgment. If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made.

Restatement (Second) of Judgments § 27, *comment h.* (1980).

*A “Not True” Finding is Unnecessary to the Trial Court’s
Decision to Continue the Defendant on Community
Supervision Rather than Revoke Him.*

In a normal criminal trial, the jury has no choice but to find the defendant guilty or not guilty, and failure to agree on the issue of guilt results in a mistrial rather than an acquittal. *See* Tex. Crim. Proc. Code art. 37.07 § 1 (b) & § 2 (a).

However, in the context of a motion to revoke community supervision, while a finding of “true” is necessary to the trial court’s decision to revoke, a finding of “not true” is unnecessary to the trial court’s decision to continue the defendant on community supervision. After a hearing on motion to revoke, the judge may continue the defendant on community supervision and refuse to revoke him, whether the judge has found the alleged violations to be true, not true, or refused to make any finding at all concerning the violations. *See* Tex. Crim. Proc. Code art. 42A.751 (d) & art. 42A.752 (a). This Court in *Tarver* acknowledged as much when it said:

We emphasize the narrowness of this holding. A mere overruling of a State’s motion to revoke probation is not a fact-finding that will act to bar subsequent prosecution for the same alleged offense. A trial court in a motion to revoke probation hearing has wide discretion to modify, revoke, or continue the probation. A court may continue or modify the probation even though finding that the allegations in the motion to revoke probation are true. A trial court’s decision either to revoke or continue a probationer’s probation may involve no fact-finding. It is only in the particular circumstances of this case, where the trial court does make a specific finding of fact that the allegation is “not true,” that a fact has been established so as to bar relitigation of that same fact.

Ex parte Tarver, 725 S.W.2d 195, 200 (Tex. Crim. App. 1986) (citations omitted). The Court in *Tarver*, however, refused to recognize the necessary implication of its concession that the trial court need not make a “not true”

finding in order to support its order continuing the defendant on community supervision.

Because the trial court's decision to continue the defendant on probation is not dependent upon a finding of "not true" to the alleged violations, the gratuitous entry of such a finding is not essential to the judgment or decision, has the characteristics of dicta, and therefore should not collaterally estop the State from later proving the facts of that violation as an independent criminal offense.

The State is not equally motivated to prove the facts of an offense for the purpose of establishing a probation violation as it is to prove the offense as an independent criminal conviction, nor are the procedures for the determination of a probation violation equally protective of the right of the State and the Defendant to a full and complete determination of the guilt or innocence of the defendant. Accordingly, collateral estoppel should not bar the State after a "not true" finding.

The Restatement of Judgments recognizes certain exceptions to collateral estoppel, some of which are applicable to the present case as follows:

§ 28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

...

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

...

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, ... or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Restatement (Second) of Judgments § 28 (1980). Similarly, other states and federal authority recognize a limitation on applying collateral estoppel where the prior proceeding involved a relatively minor offense for which the State did not have the same motivation to fully litigate the facts in question. *See Ayers v. City of Richmond*, 895 F.2d 1267, 1271 (9th Cir. 1990); 47 Am. Jur. 2d Judgments § 733 n.51 (1995).

In the present circumstances, the Texas Code of Criminal Procedure establishes an elaborate system of discovery and pre-trial hearings to protect the rights of both the Defendant and the State to a complete and trustworthy determination of the guilt or innocence of the defendant of the underlying criminal offense. Such is not the case with alleged violations of the conditions of probation, which are to be heard within the short fuse of 20 days after an incarcerated defendant requests such a hearing. *See Tex. Code Crim. Proc. § 42A.751 (d); Aguilar v. State*, 621 S.W.2d 781 (Tex. Crim. App. 1981). These differences in the quality and extensiveness of the procedures followed in a motion to revoke, as distinguished from those

followed at trial, suggest that collateral estoppel should not apply. *See* Restatement (Second) of Judgments § 28 (3) (1980).

In addition, while the consequences of a probation violation may be equally severe, depending on the punishment range for the offense for which the defendant is on probation, the finding of a violation is not itself an offense or even a circumstance for which the defendant may be punished. The motivation for the State to prove an alleged violation is not the same as its motivation to seek a criminal conviction. *See* Restatement (Second) of Judgments § 28 (5)(c) (1980).

Finally, although the State may be the same party in both instances, the victims for whom the State is seeking justice will generally be different, and the victim of the offense alleged as a probation violation will generally have no say in the State's actions on motion to revoke, and should not have his or her right to justice cut off by an adverse finding in that proceeding. *See* Restatement (Second) of Judgments § 28 (5)(a) (1980).

CONCLUSION

The District Attorney's Office for the 105th Judicial District of Texas submits the foregoing Amicus Curiae Brief for the Court's consideration in the present case.

Respectfully submitted,

/s/ *Douglas K. Norman*

Douglas K. Norman

State Bar No. 15078900

Assistant District Attorney

105th Judicial District of Texas

901 Leopard, Room 206

Corpus Christi, Texas 78401

(361) 888-0410

(361) 888-0399 (fax)

douglas.norman@nuecesco.com

RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this brief, excluding those matters listed in Rule 9.4(i)(1), is 1,536.

/s/ *Douglas K. Norman*

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that copies of this brief were e-served on December 30, 2017, on the attorney for Ms Amanda Waters, Mr. Scott Stillson, at attorney@scottstillsonlaw.com, the attorney for the State, Ms. Jennifer Ponder, at Jennifer.Ponder@co.wichita.tx.us, and the State Prosecuting Attorney, at Stacey.Soule@SPA.texas.gov.

/s/ *Douglas K. Norman*

Douglas K. Norman